

**Introduced by Senator Sher**

February 20, 2002

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An act to amend Section 21351 of the Probate Code, relating to wills and trusts.

**LEGISLATIVE COUNSEL'S DIGEST**

SB 1575, as introduced, Sher. Wills and trusts: prohibited transferees: exceptions.

Existing law, with specified exceptions, invalidates a donative transfer to the person who drafted the instrument, or to a person who is related by blood or marriage, or an employee of the drafter, among others. Existing law excepts from these provisions a transfer where the transferor is related by blood or marriage to, or a cohabitant with, the transferee or the person who drafted the instrument. Existing law also excepts transfers where the instrument is reviewed by an independent attorney, as specified, and provides a form of certificate for this purpose, and excepts a transfer that is approved by a court, as specified, among others.

This bill would include within the above-described exceptions domestic partners, as specified, and any person who lived with the transferor for at least 6 months. The bill would require an independent attorney making a review of an instrument to be excepted from the provisions described above to attempt to determine if the intended transfer is the result of fraud, menace, duress, or undue influence, and would revise the certificate the attorney is required to deliver to document his or her review. The bill would delete the exclusion of evidence of specified interested parties from a court determination of whether a transfer was a product of fraud, menace, duress, or undue influence. The bill would revise the definition of related by blood or



marriage for the purpose of the above-described exceptions. The bill would create new exceptions for any transfer that does not exceed \$3,000 and for any transfer made by an instrument executed by a nonresident of California that was not signed in California.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 21351 of the Probate Code is amended  
2 to read:

3 21351. Section 21350 does not apply if any of the following  
4 conditions are met:

5 (a) (1) The transferor is related by blood or marriage to, ~~or is~~  
6 ~~a cohabitant with,~~ the transferee or the person who drafted the  
7 instrument.

8 (2) *The transferor is the registered domestic partner, pursuant*  
9 *to Division 2.5 (commencing with Section 297) of the Family*  
10 *Code, of the transferee or the person who drafted the instrument.*

11 (3) *The transferor is a person who lived with the transferee for*  
12 *at least six months.*

13 (4) This subdivision shall retroactively apply to an instrument  
14 that becomes irrevocable on or after July 1, 1993.

15 (b) The instrument is reviewed by an independent attorney who  
16 (1) counsels the client (transferor) about the nature ~~of his or her~~  
17 *and consequences of the* intended transfer, (2) *attempts to*  
18 *determine if the intended consequence is the result of fraud,*  
19 *menace, duress, or undue influence,* and ~~(2)~~ (3) signs and delivers  
20 to the transferor and the drafter ~~a~~ *an original* certificate in  
21 substantially the following form:

22

23 “CERTIFICATE OF INDEPENDENT REVIEW

24 I, \_\_\_\_\_, have reviewed

25 (attorney’s name)

26 \_\_\_\_\_ and counseled my client,

27 (name of instrument)

28 \_\_\_\_\_, on the nature *and consequences* of the transfer, or

29 (name of client)

transfers, of property to \_\_\_\_\_  
(name of potentially disqualified person)

contained in ~~such~~ the instrument. I am so disassociated from the interest of the transferee as to be in a position to advise my client *independently*, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in ~~such~~ the instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because ~~such~~ the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

\_\_\_\_\_  
(Name of Attorney) (Date) ”

Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(c) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(d) The court determines, upon clear and convincing evidence, ~~excluding the testimony of any person described in subdivision (a) of Section 21350~~, that the transfer was not the product of fraud, menace, duress, or undue influence. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including reasonable attorney’s fees.

(e) Subdivision (d) shall apply only to the following instruments:

~~(A) Any instrument executed by a person who was not a resident of this state at the time the instrument was executed.~~

~~(B)~~

(1) Any instrument other than one making a transfer to a person described in paragraph (1) of subdivision (a) of Section 21350.

~~(C)~~

(2) Any instrument executed on or before July 1, 1993, by a person who was a resident of this state at the time the instrument was executed.

1 (f) The transferee is a federal, state, or local public entity, an  
2 entity that qualifies for an exemption from taxation under Section  
3 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust  
4 holding an interest for this entity, but only to the extent of the  
5 interest of the entity, or the trustee of this trust. This subdivision  
6 shall retroactively apply to an instrument that becomes irrevocable  
7 on or after July 1, 1993.

8 (g) For purposes of this section, “related by blood or marriage”  
9 shall include persons within the ~~seventh~~*fifth* degree *or heirs of the*  
10 *transferor*.

11 (h) *The transfer does not exceed the sum of three thousand*  
12 *dollars (\$3,000).*

13 (i) *The transfer is made by an instrument executed by a*  
14 *nonresident of California that was not signed within the*  
15 *California.*

